

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
Southwestern Bell Telephone Company, )  
Pacific Bell, and Nevada Bell Petition for )  
Relief from Regulation Pursuant to Section 706 )  
of the Telecommunications Act of 1996 and )  
47 U.S.C. § 160 for ADSL Infrastructure and )  
Service )

CC Docket No. 98-91

**REPLY OF  
KMC TELECOM INC.**

KMC Telecom Inc. ("KMC"), by undersigned counsel, hereby files its Reply to the Comments submitted in the above-captioned proceeding. In their Comments, the United States Telephone Association ("USTA"), GTE Service Corporation ("GTE"), BellSouth Telecommunications, Inc. ("BellSouth"), and the Campaign for Telecommunications Access ("Campaign") emphasize the public interest benefits associated with the deployment of advanced ADSL technologies without paying adequate attention to the public interest benefits associated with competitive provision of ADSL services. Unless competitive local exchange carriers ("CLECs") can access ADSL network facilities and services on a nondiscriminatory basis, incumbent local exchange carriers ("ILECs") such as Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell (collectively, the "SBC LECs") will ultimately be the only entities capable of providing ADSL services to consumers. The Commission must therefore ensure that the competitive safeguards set forth in the Communications Act of 1934, as amended ("Act"), continue to be enforced in the context of the ADSL services market.

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**ORIGINAL**

**I. AN EXAMINATION OF THE STATE OF COMPETITION IN THE ADSL MARKET MUST BE PART OF ANY PUBLIC INTEREST ANALYSIS.**

In their Petition, the SBC LECs claim that forbearing from regulation of ADSL technologies would promote the deployment and availability of such technologies. USTA similarly asserts that "[r]emoval of regulatory constraints imposed upon ILECs, who seek to compete in data and Internet markets, is critical to reforming regulatory policy that has denied consumers the benefits of competition."<sup>1</sup> The Campaign contends that "[w]e need to allow the marketplace to explore the utility of a new product or service as quickly as possible."<sup>2</sup> BellSouth goes even further, stating that the Commission should "seek to locate and remove *any* regulatory barrier that impedes the development of innovative technologies."<sup>3</sup>

The SBCs LECs and these supporting commenters attempt to over-simplify the question before the Commission. It is likely beyond dispute that the deployment of ADSL broadband services is in the public interest. What can be disputed, however, are the SBC LECs' underlying theories that: (i) ADSL will not be deployed without regulatory forbearance; and (ii) eliminating ILECs' obligations to provide CLECs with nondiscriminatory access to ADSL technologies will serve the public interest.

As a preliminary matter, the Commission must note that ADSL deployment is already proceeding at a rapid pace without regulatory forbearance. As WorldCom states, "Not a week goes

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<sup>1</sup> USTA, at 3.

<sup>2</sup> Campaign, at 7.

<sup>3</sup> BellSouth, at 3 (emphasis added).

by that another ILEC does not announce new or expanded plans to provide ADSL services."<sup>4</sup> Similarly, MCI notes, "Indeed, most of the ILECs have made announcements of investments and deployment in xDSL technology."<sup>5</sup> When one examines more closely the SBC LECs' request, it becomes clear that they are not so much requesting that the Commission protect investments in an advanced technology that may not be implemented as they are asking that the Commission insulate investments they have already begun to make in advanced technology.

The Commission must also be critical in examining the assertions made by the SBC LECs and their supporters regarding the public interest. The SBC LECs, joined by USTA, BellSouth, GTE, and the Campaign, would have this Commission assume away more than half of the public interest equation by ignoring or understating the competitive implications of forbearance.<sup>6</sup> The public interest examination in this proceeding, however, must focus upon more than the simple idea that making ADSL services more widely available is desirable. Instead, the Commission must also consider the cost at which the deployment of ADSL services by ILECs will occur if CLECs cannot provide ADSL services as well.

Like the SBC LECs, USTA, BellSouth, and GTE all claim that some reliance upon "market forces" and competition already present in the market will address competitive concerns about

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<sup>4</sup> WorldCom, at 11.

<sup>5</sup> MCI, at iii.

<sup>6</sup> USTA, for example, prejudges the question by referring to "arcane regulations based on fallacious theories" and "needless regulations," without ever explaining how the "market" will ensure that CLECs can access unbundled ADSL loops or resell ADSL services without placing such obligations upon ILECs. See USTA, at 3-4.

deregulating ADSL facilities and services.<sup>7</sup> All of the ILECs suffer from a fundamental misunderstanding of the current dynamics of the ADSL retail market. Specifically, the commenters overlook (or conveniently omit) the fact that the nascent level of retail competition for ADSL services in the market comes not from competitors using their own facilities, but from CLECs who depend upon the availability of ADSL loops or resold services to reach most, if not all, of their customers.<sup>8</sup> Although GTE argues that ILECs would enter the high-speed data services market with "zero market share,"<sup>9</sup> GTE fails to acknowledge the fact that – at least as far as ADSL network facilities are concerned – the ILECs control a bottleneck. If the Commission were to forbear from requiring ILECs to unbundle and resell ADSL services, it would ironically eliminate the fragile "market forces" and "competition" that the ILECs point to in claiming that the Commission should forbear from regulating ADSL services.<sup>10</sup>

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<sup>7</sup> USTA, at 4. *See also* GTE, at 4 (referring to evidence that "competitors are already providing their own ADSL service"); BellSouth, at 3 (claiming that "ILECs do not represent a monopoly in this market").

<sup>8</sup> *See* WorldCom, at 12 ("What SBC does not acknowledge, however, is the simple fact that these competitors, operating on a limited geographic basis to a few niche markets, remain dependent on the ILECs' bottleneck local loops in order to provide ADSL services to their customers.").

<sup>9</sup> GTE, at 3.

<sup>10</sup> Even in arguing that the Commission should forbear from regulating ILEC provision of ADSL services, the Campaign "acknowledges that the Commission should address the question whether a former monopoly seriously threatens exercise of monopoly power as it decides whether to grant the forbearance applied for." Campaign, at 8.

## **II. THE COMMISSION SHOULD REJECT THE STRAINED INTERPRETATIONS OF THE COMMUNICATIONS ACT OFFERED BY THE SBC LECs AND OTHER ILEC COMMENTERS.**

In addition to supporting the SBC LECs' arguments regarding forbearance, GTE and BellSouth contend that the Commission has the authority to interpret section 251(c) of the Act to exempt ADSL facilities and services from the statute's unbundling and resale obligations. According to BellSouth, "[t]he language in section 251(c) is silent on whether the obligations imposed therein apply to the ILEC networks only as those networks existed when the [Act] became effective, or to new technology deployed subsequent to that date as well."<sup>11</sup> BellSouth would read this "silence" to mean that the unbundling and resale obligations in section 251(c) do not apply to newer services such as ADSL technology.

This specious argument should not be considered an appropriate canon of statutory interpretation. There is no reason to believe that the Act was intended to be static in nature, such that any action taken or facility placed following February 1996 falls outside of its scope. If this were true, section 706 of the Telecommunications Act of 1996 would be meaningless, since the Commission would not need authorization to forbear from enforcing the Act in the context of advanced technologies if Congress never intended for the Act to apply to such technologies. Thus, the Commission should not follow BellSouth's reasoning and "freeze" the application of the Act to the world of telecommunications as it stood on February 8, 1996.

BellSouth and GTE further assert that under sections 251(c)(3) and 251(d)(2) of the Act, the Commission could find that ADSL facilities fall outside of the definition of an unbundled network

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<sup>11</sup> BellSouth, at 4.

element.<sup>12</sup> This would leave only ADSL-conditioned loops accessible to CLECs, meaning they would need to collocate in ILEC central offices and install their own electronic equipment to provide ADSL services. In evaluating this argument, however, the Commission must carefully consider the competitive implications of the ILECs' position. If the Commission were to follow the ILECs' reasoning, it would all but eliminate any guarantee that CLECs could receive access to the ILECs' bottleneck ADSL facilities on a "nondiscriminatory basis." Although the SBC LECs promise that nondiscriminatory loop provisioning can be achieved through a series of tests,<sup>13</sup> these tests (if they work at all) will only determine whether the loop in question can support ADSL – they will not ensure that the SBC LECs are providing CLECs with an equal chance to compete for customers seeking ADSL services.<sup>14</sup> Indeed, as MCI's Opposition makes clear, the SBC LECs are already failing to provide nondiscriminatory access to unbundled xDSL-capable loops, even with the section 251(c) obligations in place.<sup>15</sup> It would be contrary to both reason and experience to believe that once these obligations are removed, the SBC LECs would improve their performance in providing CLECs with access to ADSL facilities and services.

Making CLECs secure collocation space just to install additional electronic equipment for conditioned loops would only impose yet another obstacle to competitive ADSL service. As MCI states, requiring "CLECs to collocate in thousands of end offices to serve what might be a handful

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<sup>12</sup> *Id.*, at 5-6; GTE, at 5.

<sup>13</sup> SBC LECs' Petition, at 18-19.

<sup>14</sup> Furthermore, one of the tests that is ostensibly aimed at ensuring nondiscriminatory access now will not be in place until at least mid-1999. *See id.*, at 19.

<sup>15</sup> MCI, at 8-9.

of xDSL customers from a particular end office is unreasonably time-consuming and prohibitively expensive."<sup>16</sup> Given that the ILECs continue to exercise bottleneck control over the facilities and central office space necessary to provide ADSL services, the Commission should maintain the competitive safeguards governing the availability of these facilities and require ILECs to unbundle ADSL facilities in their entirety.

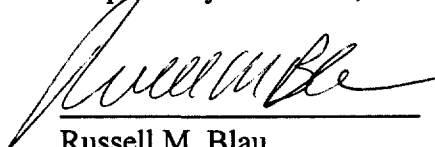
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<sup>16</sup> *Id.*, at 11.

### III. CONCLUSION

In examining whether the public interest will be served by the SBC LECs' Petition, the Commission must consider the state of competition in the ADSL services market as well as the need to promote the availability of ADSL services. Although USTA, BellSouth, GTE, and the Campaign claim that competition in the ADSL market will prevent any discriminatory behavior by the ILECs, they never address the underlying fact that CLECs depend upon the ILECs' bottleneck facilities to offer competitive ADSL services. If ILECs are not required to provide nondiscriminatory access to their ADSL facilities, they will have the incentive and the ability to prevent CLECs from providing effective competitive alternatives to customers looking for ADSL services. The safeguards set forth in section 251(c) of the Act are therefore essential to maintain and promote competitive entry in the ADSL services market.

Respectfully submitted,



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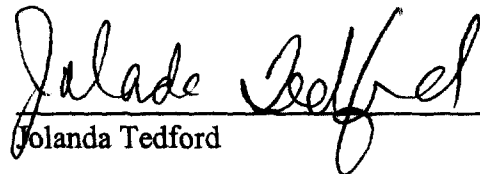
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Dated: July 1, 1998

**CERTIFICATE OF SERVICE**

I hereby certify that on this 1<sup>st</sup> day of July 1998, copies of the foregoing **Reply of KMC Telecom Inc. in CC Docket No. 98-91** were served by U.S. mail, overnight delivery and hand delivery as indicated below:

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